



United States of America  
**Federal Trade Commission**

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**Reflections upon Six Years of FTC Litigation**

*Remarks at the 6th Bill Kovacic Antitrust Salon: Where Is Antitrust Policy Going?*

The George Washington University Law School, Washington, DC

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**I. Introduction**

Many thanks for your kind introduction. I am delighted to speak with you at this wonderful event hosted by The George Washington University Law School and *Concurrences*.

Tomorrow will mark a somewhat bittersweet personal milestone: It will be my last day as a Member of the Commission. It has been an honor to serve American consumers, to work with such committed civil servants, and to have the opportunity to further develop our antitrust laws and institutions. To paraphrase an old saying, I hope I am leaving the Commission a little better than I found it.

Although I am proud of all the Commission has achieved during my tenure, I am particularly proud of its record in litigation. Over the past six years, the Commission has won important victories voiding anticompetitive agreements, halting anticompetitive mergers, and

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\* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

protecting consumers from fraudulent and deceptive practices. These victories are notable both in their own right and for their broader precedential value; in the long run, litigation allows the Commission to translate its unique competition expertise into binding legal rules.

With that background in mind, and with this panel’s focus upon the role of the judiciary in antitrust, I will address three topics. First, I will examine the Commission’s continuing use of litigation in federal court to develop the law regarding so-called cluster markets. Second, I will review efforts under my watch to solidify judicial acceptance of bargaining models in merger analysis. Third, I will address briefly the district court decision in *Viropharma*, which raises important questions about the scope of the Commission’s authority under Section 13(b) to seek equitable remedies in federal court.

## **II. Cluster Markets**

In a run-of-the-mill case, the decision-maker considers each good or service individually. That analysis often accurately reflects the underlying dynamics of the marketplace. Occasionally, however, we find markets that do not fit neatly within the traditional framework. “Cluster markets” are one such example.

At its most basic level, a cluster market includes several different goods or services. Although the law is still developing, in *Promedica* the Sixth Circuit identified two strands of the cluster market analysis.<sup>1</sup> First, an agency may cluster markets exhibiting similar competitive conditions for “administrative[] convenience.”<sup>2</sup> Second, an agency may cluster products consumers wish to purchase as a package, which the Seventh Circuit described in the *Advocate* case as products that are clustered together because “the cluster is itself an object of consumer

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<sup>1</sup> *Promedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565-68 (6th Cir. 2014); *see also* Krisha A. Cerilli, *Staples/Office Depot: Clarifying Cluster Markets*, COMP. POL’Y INT’L, Aug. 2016, at 1 (discussing both strands but using the cluster label only for the former).

<sup>2</sup> *Promedica*, 749 F.3d at 566.

demand.”<sup>3</sup> These categories may not be mutually exclusive, and for today’s purposes I will gloss over these nuances and refer to both categories simply as “cluster markets.”

Richard Posner, from whom we heard earlier today, has been at the forefront of cluster market analysis. He is widely credited with drafting, while clerking for Justice Brennan, the Supreme Court’s decision in *Philadelphia National Bank*. There the Court affirmed the finding that the relevant product market was “the cluster of products ... and services (such as checking accounts and trust administration) denoted by the term ‘commercial banking.’”<sup>4</sup> Almost 30 years later, then-Judge Posner penned an opinion of the Seventh Circuit enjoining a hospital merger in Rockford Illinois after concluding it would reduce competition in the market for “the provision of inpatient services by acute-care hospitals in Rockford and its hinterland.”<sup>5</sup>

The notion that hospital mergers implicate a cluster of inpatient services is now so widely accepted it is rarely litigated. For example, when the Commission sought a preliminary injunction to halt Penn State Hershey’s proposed acquisition of Pinnacle Health, both parties stipulated the relevant product market was “general acute care inpatient hospital services.”<sup>6</sup> The Commission likewise stipulated to cluster markets in the *Advocate*, *St. Luke’s*, and *Sanford* cases.<sup>7</sup>

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<sup>3</sup> *FTC v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016) (internal quotation marks omitted) (agreeing with and quoting *Green Country Food Market, Inc. v. Bottling Group, LLC*, 371 F.3d 1275, 1284-85 (10th Cir. 2004)); see also *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) (“We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities.”); *Promedica*, 749 F.3d at 567 (calling this concept the “package-deal” theory).

<sup>4</sup> *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 356 (1963).

<sup>5</sup> *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990). The Eleventh Circuit adopted a similar approach the following year in another hospital challenge, affirming the district court’s determination that the relevant product market was “the provision of acute-care services in general” despite evidence that the merging parties did “not compete in every acute-care service.” *FTC v. University Health, Inc.*, 938 F.2d 1206, 1210-11 n.11 (11th Cir. 1991).

<sup>6</sup> *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2017).

<sup>7</sup> See *Advocate Health Care Network*, 841 F.3d at 468; *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015); *FTC v. Sanford Health*, No. 1:17-cv-133, 2017 WL 7369054, at \*1 (D.N.D. Dec. 13, 2017).

During my tenure the Commission brought several cases alleging cluster markets outside the healthcare industry. For example, in 2015 we successfully challenged Sysco’s proposed acquisition of US Foods on the grounds that the transaction would reduce competition for “broadline foodservice distribution” to national and local customers. According to the district court, broadline service entails offering “a vast array of product offerings,” “private label offerings, next-day delivery, and value-added services.”<sup>8</sup> In 2016 we successfully challenged Staples’ proposed acquisition of Office Depot because it was likely to reduce competition in the market for “consumable office products” sold to certain targeted customers.<sup>9</sup> And during my time as Acting Chairman we alleged – and the district court subsequently found – that Wilhelmsen’s proposed acquisition of Drew Marine likely would reduce competition in the market for “the supply of marine water treatment chemicals and services to Global Fleet customers.”<sup>10</sup>

With that history in mind, I offer two observations.

First, the courts have long accepted the concept of cluster markets. After *Philadelphia National Bank* it featured primarily in healthcare mergers. During my tenure, however, the Commission increasingly applied the concept to other industries, and each time the courts have agreed. Judicial application of the principle to industries as diverse as food delivery and marine chemicals only confirms its soundness as an analytic tool.

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<sup>8</sup> *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 24 (D.D.C. 2015).

<sup>9</sup> *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 127 (D.D.C. 2016).

<sup>10</sup> Compl. ¶ 13, *FTC v. Wilhelm Wilhelmsen Holding ASA*, No. 1:18-cv-00414 (D.D.C. filed Feb. 22, 2018). As Commission staff have since explained, this “relevant product market grouped boiler water treatment (BWT) products and services and cooling water treatment (CWT) products and services together in a cluster market of marine water treatment products and services.” Amy Dobrzynski, *FTC Bureau of Competition, Lessons from FTC v. Wilhelmsen for Merger Practitioners*, Sept. 10, 2018, available at <https://www.ftc.gov/news-events/blogs/competition-matters/2018/09/lessons-ftc-v-wilhelmsen-merger-practitioners>. Although BWT and CWT products and services “are not reasonably interchangeable substitutes for each other,” the court agreed to cluster them given similarities in their competitive conditions and market dynamics. *Id.*

Second, the cases involving cluster markets emphasize how important facts are in merger analysis. In each of the cases I have described today, the facts indicated that several individual products or services should be considered together. That is not to say we find a cluster market under every rock. Rather, consistent with the *Brown Shoe* requirement that we undertake a “pragmatic, factual approach to the definition of the relevant market,”<sup>11</sup> we must grapple with the facts each and every time. Sometimes the facts lead us to cluster markets, sometimes they do not.

### **III. Bargaining Models**

I am also proud of our litigation record in cases involving a second tool we use in merger analysis, bargaining models. Bargaining models estimate the likely outcome of negotiations between a large supplier and a large customer. They are often used in merger analysis to determine whether a transaction would materially change a party’s bargaining power, and therefore the terms of the bargains it strikes. Bargaining models are frequently used to assess healthcare mergers.

In 2016 the Commission used bargaining models to define the relevant market in two hospital cases, Advocate-NorthShore and Penn State Hershey-Pinnacle. The cases are remarkably similar. Before the district court, we alleged each transaction would grant the merged entities significantly greater power when they bargain with insurers.<sup>12</sup> In each case the

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<sup>11</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962). Although the Court there was specifically addressing the definition of geographic markets, it explained that “[t]he criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market.” *Id.*

<sup>12</sup> Compl. ¶¶ 55-61, *FTC v. Penn State Hershey Med. Ctr.*, No. 1:15-cv-02362 (M.D. Pa. filed Dec. 9, 2015); Compl. ¶¶ 47-53, *FTC v. Advocate Health Care Network*, No. 15-cv-11473 (N.D. Ill. filed Dec. 21, 2015).

district court judge rejected our proposed geographic market and therefore denied our motion for a preliminary injunction.<sup>13</sup> Both decisions were reversed on appeal.<sup>14</sup>

The decision to appeal was the right one. In both cases, the court of appeals ultimately created a new binding precedent endorsing the use of bargaining models in health care mergers. The bargaining model was particularly important in the *Hershey* litigation. There the Third Circuit credited evidence from previous bargaining sessions that insurers could not successfully market an insurance plan without including hospitals from “the four-county Harrisburg area.”<sup>15</sup> Because the merger would eliminate Pinnacle, which insurers viewed as part of the only effective alternative to the Penn State network, the court found the acquisition would substantially reduce insurers’ bargaining power in reimbursement rate negotiations with Penn State.<sup>16</sup> The Seventh Circuit’s opinion in *Advocate*, which issued two months after the Third Circuit’s decision in *Hershey*, did not explicitly reference a bargaining model but followed similar logic.<sup>17</sup>

#### **IV. The Commission’s Remedial Authority under Section 13(b)**

Speaking of appeals, the Third Circuit is now considering an important appeal in the Viropharma litigation.<sup>18</sup> Viropharma manufactured the branded pharmaceutical product Vancocin, an old product that no longer enjoyed any patent protection or regulatory exclusivity.<sup>19</sup> When generics attempted to enter the market by using the very same *in vitro*

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<sup>13</sup> *FTC v. Penn State Hershey Med. Ctr.*, 185 F. Supp. 3d 552, 558, 564 (M.D. Pa. 2016); *FTC v. Advocate Health Care*, No. 15-C-11473, 2016 WL 3387163, at \*4-5 (N.D. Ill. June 20, 2016).

<sup>14</sup> *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 345-354 (3d Cir. 2017); *FTC v. Advocate Health Care Network*, 841 F.3d 460, 473-76 (7th Cir. 2016).

<sup>15</sup> *Penn State Hershey*, 838 F.3d at 346.

<sup>16</sup> *Id.* at 345-46.

<sup>17</sup> *Advocate Health Care Network*, 841 F.3d at 470-71 (discussing the health insurance bargaining process and citing *Penn State Hershey*).

<sup>18</sup> *FTC v. Shire ViroPharma Inc.*, No. 18-1807 (3d Cir.).

<sup>19</sup> Compl. ¶¶ 30-36, 42, *FTC v. Shire ViroPharma Inc.*, No. 1:17-cv-00131 (D. Del. filed Feb. 7, 2017).

bioequivalence testing the brand itself had used to obtain regulatory approval,<sup>20</sup> however, Viropharma successfully delayed generic entry for six years by filing a series of meritless petitions with, and lawsuits against, the FDA.<sup>21</sup> By prolonging its monopoly, Viropharma's conduct generated hundreds of millions of dollars in supracompetitive profits.<sup>22</sup>

In response, while I was Acting Chairman the Commission voted out a complaint seeking two equitable remedies in federal district court. First, we sought to permanently enjoin Viropharma from using similar methods to exclude generic competition to its other branded products.<sup>23</sup> Second, we sought to recover Viropharma's ill-gotten gains and distribute them to the harmed consumers.<sup>24</sup>

The district court dismissed the complaint on what it characterized as "novel" grounds,<sup>25</sup> holding that Section 13(b) of the FTC Act imposes a very high bar to injunctive relief that the Commission failed to clear in this case.<sup>26</sup> Specifically, the district court ignored decades of precedent that credible charges of a past violation give rise to a presumption of future violations and concluded instead that Section 13(b) allows injunctive relief only if the Commission can prove that the defendant is imminently "about to violate" the FTC Act.<sup>27</sup> Because Viropharma's efforts to forestall generic competition for Vancocin ceased in 2012, when generics finally entered, the district court found Viropharma was not imminently about to violate the law again and therefore the Commission had not stated a claim upon which relief could be granted.<sup>28</sup>

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<sup>20</sup> *Id.* ¶¶ 34-36, 43-46.

<sup>21</sup> *Id.* ¶¶ 118-129.

<sup>22</sup> *Id.* ¶ 149.

<sup>23</sup> *Id.* at 44-45.

<sup>24</sup> *Id.*

<sup>25</sup> *FTC v. Shire ViroPharma Inc.*, No. 17-131-RGA, 2018 WL 1401329, at \*2 (D. Del. Mar. 20, 2018).

<sup>26</sup> *Id.* at \*4-8.

<sup>27</sup> *Id.* at \*5-6.

<sup>28</sup> *Id.* at \*6.

The imminence standard applied by the district court could seriously undermine the Commission’s ability to challenge anticompetitive conduct in federal court. Section 13(b) is, at least today, the primary remedial tool the Commission uses when it litigates conduct matters in federal court. By significantly narrowing its scope, the district court decision risks giving serial offenders a free pass; like a schoolyard bully, they need only tell the judge they have already taken consumers’ lunch money and therefore don’t need to do it again. Case dismissed.

Speaking solely for myself, I hope the Third Circuit will reverse for two reasons. First, the district court’s decision is at odds with the standard applied in many other circuits. For example, in *POM Wonderful v. FTC* the D.C. Circuit explained that it may be inappropriate for the Commission to order injunctive relief “if the affected parties have not shown a propensity toward violating the [FTC Act] and nothing in the record suggests the likelihood or even the possibility of further violations.”<sup>29</sup> The court deemed injunctive relief appropriate because the Commission found POM had “engaged in a deliberate and consistent course of conduct” to violate the FTC Act; it was “a demonstrated propensity” rather than an “isolated incident or mistake.”<sup>30</sup> That description fits *Viropharma* to a tee.

Second, intuitively it makes no sense to set the bar as high as the district court did. In this case it may be useful to analogize to a carnival game called Duck Hunt. In the game you are expected to shoot metal ducks as they pass a few feet in front of you. The key to the game is anticipation: Each duck travels fast enough that you need to aim where it is *going to be* a second later. How do you predict where the duck is going to be? If the first duck passes from right to left, then the second, and so on, then you can discern a pattern and aim accordingly.

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<sup>29</sup> *POM Wonderful, LLC, et al. v. FTC*, 777 F.3d 478, 499 (D.C. Cir. 2015).

<sup>30</sup> *Id.*

In Viropharma's case, we have just such a pattern. It made more than forty meritless filings over many years to forestall generic competition. So if *Viropharma* repeatedly acted that way in the past, the Commission has reason to believe it will do so again. Or, to return to my analogy, if you've just watched forty ducks pass from right to left, it's reasonable to believe another one will soon enter stage right.

## **V. Conclusion**

In conclusion, I am proud of the Commission's litigation record during my tenure and heartened by its many victories. In a series of litigated challenges to mergers, we broadened the use of cluster markets in merger analysis. Whereas it was traditionally a tool used in health care mergers, we successfully applied it to mergers of firms selling broadline foodservice distribution, consumable office products, and marine chemicals. We also successfully litigated the applicability of bargaining models in health care mergers. Although we did not receive the relief we requested from the district court in the *Viropharma* litigation, I am confident that the Third Circuit will rule that Section 13(b) does not give repeat offenders a free pass so long as they've already gotten what they wanted and promise not to do it again.